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No. 325

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

CREST FINANCE CO., INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

## BRIEF OF NATIONAL COMMERCIAL FINANCE CONFERENCE, INC., *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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## BRIEF OF NATIONAL COMMERCIAL FINANCE CONFERENCE, INC., *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

### Jurisdictional Statement.

This brief is respectfully filed upon the written consents of the Petitioner and the Respondent pursuant to Rule 42, paragraph 1, of the Rules of this Court. Such written consents are submitted herewith.

### Interest of *Amicus Curiae*.

National Commercial Finance Conference, Inc. is a non-profit membership corporation organized under the laws of Delaware. It is the national trade association for the commercial finance and factoring industry, having more than one hundred members, of varying size, operating on a national, regional, or local scale. They offer secured credit

to manufacturers, wholesalers, and retailers whose products and services embrace the entire economic range. While these borrowers are both large and small, the bulk of them are properly characterized as "small business".

The importance to small business of financing and factoring facilities has long been recognized. On this subject, the Board of Governors of the Federal Reserve System reported to the Congress as follows ("Financing Small Business", Report to the Committees on Banking and Currency and the Select Committees on Small Business, April 11, 1958, Volume 2, Survey IV, pp. 1-3):

> "Commercial finance companies and factors play a significant role in the financing of small businesses in manufacturing and wholesale trade. Commercial financing and factoring are particularly significant in a study of small business financing because credit is made available to small businesses that do not have access to bank credit or to the markets for equity and long-term debt funds."

The *amicus curiae's* members transact an annual volume of business in excess of $10,000,000,000. Similar business is transacted by non-member companies, and by many commercial banks. This additional volume is certainly substantial, although accurate statistical information on its size is not readily available.

## Importance of the Decision in this Case.

The development of secured commercial financing during the past half-century has paralleled the expanding national economy and the growing demand for the mass production and distribution of goods. The extent of secured credit, and the variety of its techniques, have kept pace with the

demand. Among its more conventional forms are the following:

1. Accounts receivable financing (as in the case at bar).

2. Factoring, including inventory loans.

3. Equipment financing, generally in the form of chattel mortgages or conditional sale agreements.

4. Financing of merchandise under trust receipts, warehouse receipts, and other forms of commercial paper.

5. The refinancing of consumer paper and department-store charge accounts.

These and other forms of secured financing have one feature in common: they are all based primarily upon the integrity of the collateral security. Since the decision of the Court of Appeals in this case directly imperils the security, it is thus of crucial importance both to the institutions which extend secured credit and to the small businessmen who depend upon it for their day-by-day cash requirements.

The decision below, although by its terms applicable only to accounts receivable financing, jeopardizes all forms of secured financing. In this case, for example, the secured lender made advances in good faith, and took and perfected contractual security therefor in due compliance with the applicable local law, at a time when the borrower was not subject to any outstanding assessments of Federal taxes. Nevertheless, the Court of Appeals has held that the secured lender's lien became inferior to Federal taxes *subsequently* assessed.

A bank or other lending institution faces an intolerable operational burden if its collateral is open to attack based upon tax liabilities incurred by the borrower *after* the secured financing is extended. Every prudent lender will surely hesitate to advance cash to even the most worthy of borrowers, in the absence of assurance that the collateral, validly and currently taken, will not be snatched away by the sovereign. This is precisely what occurred in this case. Such a threat of virtual expropriation of collateral constitutes an enormous increase in risk; it must inevitably lead to sharp increases in finance costs, and in many instances would either curtail, or cut off altogether, secured financing accommodation in the very area of our economy which needs it most.

It is indeed ironic that the source of the difficulty is the Federal Government itself. The national public policy in favor of small business has been expressed over the years in a series of Congressional enactments, two of the more recent being the acts creating the Small Business Administration (Public Law 85-536, 72 Stat. 384 et seq.) and setting up the Small Business Investment Program (Public Law 85-699, 72 Stat. 689 et seq.). Both statutes stress the importance of encouraging the free flow of private credit to the small businessman. The decision at bar threatens to raise the cost of such credit to prohibitive levels or to throttle it completely, thus thwarting our oftstated public policy and impeding our economic mechanism.

## Conclusion.

The *amicus curiae* regards the decision under review as adverse to the national interest, in that it constitutes an unjustified impediment to the vital flow of secured credit. Accordingly, the *amicus curiae* joins in, and urges the granting of, the petition for a writ of certiorari.

Respectfully submitted,

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and

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